

SEP 13 2006

Docket No. 13282-2

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

5 Applicant: Clarke

Group Art Unit 1761

Serial No.: 09/989,682

Examiner Weinstein, Stephen L.

Filing Date: November 20, 2001

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Title: Packaging of Respiring Biological Materials

Mail Stop AF

15 Commissioner for Patents

P.O. Box 1450

Alexandria, VA 22313-1450

**PETITION TO REMOVE THE FINALITY OF THE OFFICE ACTION**

20 Sir,

This paper is a petition to remove the Finality of the Office Action mailed June 16, 2006. Applicant recognizes that such a petition should have been filed by July 16, 2006, but requests that it should nonetheless be considered. If the Examiner continues to reject the claims, and this Petition is not granted, so that an Appeal is necessary, it

25 will be difficult or impossible for the Board to give proper consideration to the patentability of the application.

Applicant submits that the finality of the office action should be withdrawn for the following reasons.

30 1. The rejection under 35 USC 103 is over US 3,798,333 (Cummin) "in view of applicant's admission of the prior art, further in view of... (eight references)". The same rejection was made in the previous office action on the merits, mailed 03/31/2004, and in the reply to that Office Action, Applicant noted

**CERTIFICATE OF FACSIMILE TRANSMISSION UNDER 37 CFR 1.8**

I hereby certify that this paper is being sent by facsimile transmission to the United States Patent and Trademark Office (571-273-8300) on September 14, 2006

Typed name of person signing this certificate: T. H. P. Richardson, Reg No. 28,805, Tel No. 650 854 6304

Signature

PAGE 4/42 \* RCVD AT 9/14/2006 12:38:33 AM [Eastern Daylight Time] \* SVR:USPTO-EFXXF-3/13 \* DNIS:2738300 \* CSID:6508542384 \* DURATION (mm-ss):13-20

*The Examiner has not specified what that alleged admission is, or where such admission is to be found. It is not possible, therefore, to carry out, either with regard to the alleged admission on its own or in combination with the other references, the actions mandated by MPEP 2141.... If the Examiner maintains any rejection which relies on an alleged admission by the Applicant, he is asked to specify what that admission is and where it is to be found.*

In the outstanding Office Action, the Examiner again relies on "applicant's admission of the prior art", and asserts, without further explanation,

*The rejection appears to clearly state what applicants admission of the prior art is relied on to teach.*

At no point, however, in this or the previous Office Action, is there **any** statement, let alone any clear statement, what the Examiner regards as having been admitted by the applicant, still less what that alleged admission is relied upon to teach. As a result, no "clear issue" has been developed between the Examiner and the Applicant, and as noted in the MPEP 706 .07, a final rejection is in order only when such a clear issue has been developed.

2. Page 4 of the outstanding Office Action includes, at the end of a paragraph, the following statement.

*The claims are also rejected employing Shimizu as the primary reference to teach both the shipping container containing sealed packages and the sealed package itself that have bananas passed their climacteric and wherein the packaging is permeable to the gases of respiration and wherein the packaging atmosphere includes exogenous ethylene and wherein the remainder of the art taken as a whole can be relied on as above to teach the manipulation of the well-known produce storage variables of weight, permeability etc.*

There is no other reference to a rejection of the claims using Shimizu as the primary reference, still less a full statement of such a rejection, identifying the statutory ground of the rejection and any secondary references relied upon. It is again apparent that no clear issue has been developed between the Examiner and the Applicant.

3. As briefly noted above, the rejection based on Cummin as the primary reference relies on eight secondary references (as well as the unidentified "admission of prior art"). However, apart from the formal statement of the rejection,

(a) the disclosure of the primary reference, Cummin, is referred to just once,  
5 in a sentence which reads

*In regard to claim 19 Cummin discloses that the applicant is not the first to store bananas in a sealed bag that is permeable to oxygen and carbon dioxide;*

(b) five of the secondary references (Badran, Scolaro, Badran et al. Anderson  
10 and Antoon) are referred to just once, in a sentence on page 2 which reads

*As applicants admission of the prior art, Badran, Scolaro, Badran et al., De Moor, Anderson and Antoon attest to, the application of gas permeable packages and modified atmospheres to slow down ripening and increased storage life of produce, including bananas is notoriously old;*

(d) the other secondary reference, Herdeman, is referred to just once, in a  
15 sentence on page 3, which reads

*It is noted that Herdeman further discloses reducing the oxygen upon initiation of ripening.*

20 The rejected claims (i.e. the claims before the amendments requested in the reply to the Office Action mailed 06/16/2006, which further limit those claims) included the following feature (as well as other features not listed below)

(1) the sealed polymeric bag containing the bananas has an oxygen  
25 permeability at 13°C per kg of bananas in the package (OP13/kg) of at least 700 ml//atm.24 hr.

The Office Action nowhere refers to this feature, or to a number of the features present in dependent claims, some of which are now included in the independent claims.

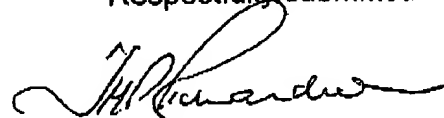
30 The Office Action frequently refers to "the art taken as a whole" in support of the rejection, the phrase "the art taken as a whole" in fact occurring about 12 times, and on page 4, the Office Action states

*The rejection is based on what the art taken as a whole teaches...*  
it is believed to be clear that such a rejection does not comply with the statute.

5 As will be clear from the summary above, the Office Action does not explain why  
the references, either separately or in combination, disclose the various features of the  
claims, as is required by, for example, MPEP 2143.03 ("all the claim limitations must be  
taught or suggested by the prior art"). It is again apparent that no clear issue has been  
developed between the Examiner and the Applicant.

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Respectfully submitted



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